

From: Johannes Ernst
To: Microsoft ATR
Date: 11/16/01 11:48pm
Subject: comments about the settlement

The settlement is not in the public interest because:

- 1) Over years, Microsoft has made and continues to make large amounts of illegal monopoly profits. Nothing in the settlement remedies this. A large fine is necessary.
- 2) Tomorrow, if Microsoft decided that SQL Server was part of Windows, and Office was part of Windows, the settlement agrees that that would be okay as Microsoft gets to decide what is part of windows and what is not. Not putting a limit on what new functions can be integrated into Windows is obviously not acceptable.
- 3) As you know, and as many Microsoft employees and ex-employees have stated publicly before about cases in the past, if Microsoft, for whatever reason, is forced to publish their APIs early on, which would allow competitors to be on equal footing with similar Microsoft products, Microsoft outruns them by keeping changing the APIs -- essentially forcing the competitors to always follow and never be on the same page. This is well-documented practice. There is nothing in the settlement that prevents this practice. Note that because of all the ill-gotten monopoly profits, Microsoft is better capitalized than any other software company, and will thus always win this battle.
- 4) The settlement makes free and highly innovative software such as Samba essentially impossible. This is very clearly against the public interest. Microsoft should be forced to license all API-related intellectual property for free.
- 5) A good measure for whether "competition has been restored" in the software industry is whether or not startup companies will get funded by professional venture capital investors in Silicon Valley, who may compete with Microsoft some time down the road. This settlement makes no difference in this respect at all. ANY investor will run immediately if there is even a remote chance that there will be competition with Microsoft at any point in time. This is clearly not a market that is level, allowing free innovation for the benefit of consumers.
- 6) The proposed restrictions on Microsoft conduct are in no relationships to the size of the violations of the law. The settlement is so obviously insufficient that we have to assume that the justice department was somehow politically motivated to agree to these terms. If so, the judge is obliged to turn down the settlement under the relevant laws.

7) Any serious conduct remedies -- while theoretically possible -- will be so complex and difficult to enforce that they are infeasible in practice. The original court was correct that the appropriate remedy is breakup.

8) Microsoft should be forced to publish all APIs to its operating system sufficiently in advance to a commercial release, so that 3rd parties have a chance to build competing products in time. If a 3rd party could build a Linux-based Windows API emulator, for example (which they can't in practice, see issue #3 above ...), competition would be much more real. In an even better scenario, it would be a standards body under the auspices of a recognized standards authority who would define the APIs, not Microsoft.

9) Similarly to the rules that carmakers are under in California, Microsoft should be forced to make sure that by a certain date, say, 3 years from now, at least X percent of all desktop operating systems sold are not Microsoft's. I don't see a reason why this can't be demanded -- and it would most certainly restore competition.

10) Microsoft should be prevented from leveraging the desktop monopoly into any other market whatsoever, such as embedded systems or servers.

Thus I believe the settlement is very far from the public interest. It should not be accepted by the court.

Best regards,

Johannes Ernst.